

January 11, 2023

Employees Gain New Protections for Pregnancy, Childbirth Recovery and Lactation

Authors: Susan W. Kline, Alexa E. Miller

The Pregnant Workers Fairness Act (PWFA), which was signed into law on December 29, 2022, and will become effective as of June 27, 2023, generally will require employers to accommodate pregnant applicants and employees (including “temp” workers) in the same manner as individuals with disabilities. Nothing in the PWFA constrains states and localities from enacting and enforcing, or continuing to enforce, laws with greater protections for pregnant workers.

The PWFA requires covered employers (those with 15 or more employees) to reasonably accommodate applicants and employees with temporary pregnancy- or childbirth-related condition. It prohibits discrimination against such individuals because of any need for pregnancy-related accommodation. The reasonable accommodation requirement parallels provisions of the Americans with Disabilities Act.

The PWFA expands the pregnancy-related protections of the Pregnancy Discrimination Act, which protects employees from discrimination based on pregnancy or related conditions but does not impose an accommodation obligation. It also expands on current case law. The U.S. Supreme Court’s 2015 decision in *Young v. United Parcel Service Inc.* held that employers who provided accommodations for other similarly situated workers with medical restrictions could not deny comparable accommodations to pregnant workers, but the ruling did not go as far as requiring pregnancy-related accommodation independent of such comparator situations.

Key points for employers to keep in mind in complying with PWFA requirements include:

- Employers need not assume that pregnant applicants or workers need accommodation but must provide

reasonable accommodations for any “known limitations” related to pregnancy, childbirth or related medical conditions.

- A requested accommodation may be denied on grounds of undue hardship, but only following an interactive process of exploring alternatives. Employers should carefully document the basis for any denial based on undue hardship.
- Be aware that “automatic” forms of accommodation, such as leave or light duty for any worker in an advanced stage of pregnancy, is subject to challenge. The PWFA prohibits employers from requiring qualified employees affected by pregnancy, childbirth or related conditions to accept any accommodation other than a reasonable accommodation arrived at through an interactive process. The new law specifically prohibits employers from unilaterally placing pregnant employees on leave, even if paid, if the employee’s limitations can be reasonably accommodated on the job.
- Denying current employment or deferring a start date due to an applicant’s pregnancy that could be reasonably accommodated, regardless of the stage of the pregnancy, may trigger a legal challenge. Because leave may be a form of reasonable accommodation, a recently hired employee who needs leave following childbirth may be entitled to leave with job protection prior to attaining FMLA eligibility.
- Covered employees remain entitled to any greater protections provided under applicable state or local law.

The Equal Employment Opportunity Commission (EEOC) will enforce the PWFA following the same procedures, and with the same enforcement remedies, as with Title VII claims. The new law directs the EEOC to publish regulations interpreting the PWFA, with accommodation examples.

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act extends workplace protections for nursing mothers to exempt employees and expands existing remedies for violations.

Specifically, the PUMP Act amends the Fair Labor Standards Act (FLSA) to require employers with 50 or more employees to provide reasonable break time for all employees, including salaried exempt employees, to express breast milk as needed for one year after the child’s birth. Previously, lactation accommodations under the FLSA were limited to non-exempt employees.

Employers retain the obligation to provide a suitable private location (other than a restroom) to express breast milk that is close to the employee’s work area, shielded from view, and free from intrusion from co-workers and the public. However, the new law clarifies that such breaks need not be paid unless the non-exempt employee is pumping during an otherwise paid break period or is “not completely relieved from duty” during such breaks. Exempt employees should be paid their full salary as required by federal, state and local law, regardless of

whether they take breaks to express breast milk. Employers with fewer than 50 employees can take advantage of the undue hardship exception to the FLSA's requirement to provide reasonable break times for nursing mothers if providing such accommodation would cause undue hardship because of significant difficulty or expense.

Like the PWFA, the PUMP Act does not preempt state or local laws that provide greater benefits and protections. By way of example, New York law requires employers to provide lactation accommodations for nursing mothers for up to three years following the child's birth and Connecticut law requires employers to provide private lactation rooms that include or are situated near a refrigerator or employee-provided portable cold storage device to store the breast milk and have access to an electrical outlet, absent undue hardship.

Enforcement of the PUMP for Nursing Mothers Act is effective April 28, 2023, and subject to remedies provisions of the FLSA, including a private right of action for aggrieved employees who have faced retaliation under the PUMP Act.

We recommend properly training HR and managers on how to respond to workplace accommodation and leave requests to ensure compliance with these new laws. As a practical matter, employees often request access to a room they can lock from the inside to avoid interruptions. Although the PUMP Act is silent on this, as a best practice, the room should be shielded from public view and have a door equipped with a functional lock to ensure privacy. Employers should also consider providing access to an electrical outlet, adequate seating, a small table, and a refrigerator for purposes of storing expressed milk, even where not already required by state or local law. In alignment with the law's goal to support breastfeeding women in balancing work and motherhood, many companies are also offering progressive benefits such as providing for the storage and shipment of breast milk to the employee's home while the employee is traveling for business. Employers should take steps now to make these types of accommodations available as needed and update their policies accordingly.

The material contained in this communication is informational, general in nature and does not constitute legal advice. The material contained in this communication should not be relied upon or used without consulting a lawyer to consider your specific circumstances. This communication was published on the date specified and may not include any changes in the topics, laws, rules or regulations covered. Receipt of this communication does not establish an attorney-client relationship. In some jurisdictions, this communication may be considered attorney advertising.

MEET THE AUTHORS



Susan W. Kline

Partner

+1 317 237 1059

Indianapolis

susan.kline@faegredrinker.com



Alexa E. Miller

Partner

+1 973 549 7122

Florham Park

alexa.miller@faegredrinker.com

Related Legal Services

Labor & Employment